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No. .....
IN THE

# Supreme Court of the United States

October Term, 1982

KENNETH THOMAS DILL, MARK RICHARD BARTHOLOMEW and VINCENT SCOTT PERRI,

*Petitioners,*

*vs.*

DAVIES NITRATE CO. and OLIN CORPORATION,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COUKT OF APPEALS FOR THE NINTH CIRCUIT

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## Questions Presented.

1. Whether the lower Court's refusal to consider Plaintiffs' expert's opinion on an ultimate issue of fact in response to Defendants' motions for summary judgment is contrary to the new Federal Rules of Evidence, Rules 702-705, which expressly provide that opinion evidence on an ultimate issue of fact is admissible.

2. Whether Plaintiffs were deprived of their constitutional right to jury trial under the Seventh Amendment and due process under the Fourteenth Amendment by (a) the lower court's refusal to consider Plaintiffs' expert's opinion on an ultimate issue of fact, and (b) its order granting Defendants' motion for summary judgment on the ground there was no triable issue concerning this very fact.

3. Whether the decision of the Ninth Circuit has improperly shifted the burden on motions for summary judgment to the resisting party, plaintiffs, to show the existence of a triable issue of fact without first requiring the moving party, defendants, to show the absence of such issue, contrary to this Court's decision in *Adickes v. S.H. Kress & Co.* (1970) 398 U.S. 144.

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*vs.*

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*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Kenneth Thomas Dill, Mark Richard Bartholomew and Vincent Scott Perri respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 26, 1982.

### OPINIONS BELOW

The unreported memorandum opinion of the Court of Appeals for the Ninth Circuit is reproduced as Appendix "A" hereto. The unreported opinion of the United States District Court, Central District of California is reproduced as Appendix "B" hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 26, 1982. A timely Petition for Rehearing and Suggestion that Rehearing be En Banc was denied on June 8, 1982 (a copy of the order denying rehearing is reproduced as Appendix "C" hereto), and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution:

   Fifth Amendment (in relevant part):

   "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

   Seventh Amendment:

   "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

2. Federal Rules of Evidence:

   Rule 702:

   "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

   Rule 703:

   "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the

hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

Rule 704:

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Rule 705:

"The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

3. Federal Rules of Civil Procedure, Rule 56. Due to the length of Rule 56, it is not set forth verbatim at this point and instead is set forth as Appendix "D" hereto. (U.S. Sup.Ct. Rules, Rule 21.1(f) and (k), 28 U.S.C.)

## STATEMENT OF THE CASE

The facts of the case are as follows:

1. On September 20, 1975, Petitioners Kenneth Thomas Dill, Mark Richard Bartholomew and Vincent Scott Perri were national guardsmen on duty at Fort Irwin, California. As part of their duties on that date, Petitioners were engaged in the firing of a 155 mm Howitzer Cannon. (Deposition of Mark Richard Bartholomew, p. 131 to p. 133.) Petitioners placed the propellant charge in the breech of the artillery piece and prepared the cannon for firing. The projectile or artillery round was fused. (Depositions of Mark Richard Bartholomew, p. 132 to p. 133, Kenneth Thomas Dill, p. 63 to p. 64, p. 88 to p. 89, and Vincent Scott Perri, p. 91 to p. 92.) When Kenneth Dill pulled the lanyard to fire the

artillery piece, the round exploded prematurely "in-bore", *i.e.*, within the artillery piece itself, causing great and tragic injury to Dill, Bartholomew and Perri. (Ninth Circuit's opinion, page 1 [Appendix "A"]; Depositions of Kenneth Thomas Dill, p. 65 to p. 74, and Mark Richard Bartholomew, p. 133 to p. 134.)

2. Respondent Olin Corporation is the manufacturer of the propellant charge and Respondent Davies Nitrate Co. is the manufacturer of potassium nitrate, one of the chemicals used in the charge. (Ninth Circuit's memorandum opinion, page 1 [Appendix "A"].)

3. Petitioners filed this diversity action in the United States District Court for the Central District of California. (28 U.S.C. §1332(a)(2).) (Complaint for Personal Injuries [C.R. 1, et seq.[1]].)

4. On May 3, 1978, Respondent Davies Nitrate Co. filed a Motion for Summary Judgment (C.R. 355, et seq.), based on the affidavits of its attorney H. Andrew Wasmund (C.R. 357-359) and plant manager Thomas W. Wheaton (C.R. 440-442). (The affidavits of Mr. Wasmund and Mr. Wheaton are reproduced as Appendices E and F, respectively.) On May 23, 1978, Respondent Olin Corporation filed a Motion for Summary Judgment supported by the Affidavit of Byron C. Baldridge. (C.R. 364, et seq. [Mr. Baldridge's affidavit is reproduced as Appendix G].)

5. On June 26, 1978, Petitioners filed opposition to the motions for summary judgment (C.R. 397, et seq.), supported by the affidavit of Shelley Braverman (C.R. 436-437 [reproduced as Appendix H]). Mr. Braverman's affidavit states the following (at C.R. 436-437):

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[1] "C.R." refers to the Clerk's Record prepared for the appeal to the Ninth Circuit.

"1. I am a munitions and fire arms expert and have previously qualified to testify as an expert, and have testified in Federal Court, on the subject of the causes of and product defects leading to premature in-bore explosion in military canon of the same or similar type as is represented in the within action of Kenneth Thomas Dill, et al. vs. Etowah Manufacturing Company, et al., defendants; said accident having taken place on September 20, 1975 at Ft. Irwin, California.

"2. I have over thirty-two (32) years of experience dealing with aspects of design and manufacture of fire arms, explosives and munitions.

"3. At the request of attorneys for plaintiffs, I have investigated the subject accident of September 20, 1975, involving a premature in-bore explosion of a 155 mm artillery shell at Fort Irwin, California, September 20, 1975. I have personally visited the Picatinny Arsenal in Dover, New Jersey and have personally examined remaining fragments of the subject artillery shell. I have reviewed photographs of the accident scene and of the remaining shell fragments. I have reviewed Army documents and reports supplied to me by attorneys for the plaintiffs.

"4. Based upon my knowledge and investigation of the accident and based upon my years of training and experience in the armaments and munitions field, it is my opinion that the subject round was fused prior to the premature in-bore explosion of September 20, 1975: it is further my opinion that the substandard and/or defective condition of the propellant charge was a cause of the premature in-bore explosion of September 20, 1975."

6. On October 18, 1978, the United States District Court, Central District of California filed findings of fact and conclusions of law, which are reproduced as Appendices I and J, respectively. On October 18, 1978, the district court

filed its "Memorandum to Counsel" setting forth its reasons for granting summary judgments in favor of Davies Nitrate Co. and Olin Corporation. (Appendix "B".) On October 20, 1978, the district court filed and entered summary judgments in favor of Davies' Nitrate Co. and Olin Corporation. (The district court's orders are reproduced as Appendices K and L.)

7. Petitioners appealed. On March 26, 1982 the Court of Appeals for the Ninth Circuit filed its Memorandum affirming the summary judgments by a 2-1 vote, Judge East dissenting. (Appendix "A".) The Ninth Circuit's Memorandum states, in pertinent part, the following:

> "The appellants argue that a genuine issue of material fact was created by their expert's affidavit which stated that the 'substandard and/or defective condition of the propellant charge was a cause of the premature in-bore explosion. . . .' The affidavit does not mention any defect in the chemical manufactured by appellee Davies Nitrate, nor does it identify the defect or describe the nature of the substandard condition of the propellant. An affidavit so devoid of particulars does not create a triable issue of fact as to the existence of a defect; it is no more than an assertion concerning the ultimate issue to be proved. As this court stated in *United States v. Various Slot Machines*, 658 F.2d 697, 700 (9th Cir. 1981), 'in the context of a motion for summary judgment, an expert must back up his opinion with specific facts.' *See* 6 *Moore's Federal Practice*, ¶56.22[1], at 1316 (1980) ('The affidavit [in a Rule 56 motion] is no place for ultimate facts and conclusions of law. . . .').
>
> "This Court's decision in *Bieghler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980), is readily distinguishable since in that case, a negligence action, the expert's affidavit clearly identified the precise substandard con-

dition (insufficient lighting) which caused the accident. We made that distinction in *United States v. Various Slot Machines, supra*, at 701. The expert's affidavit in this case did not identify the defect or substandard condition."

8. Following the Ninth Circuit's decision, Petitioners sought a rehearing and suggested rehearing en banc. Petitioners stated they stand ready to come forward with a supplemental affidavit by their expert setting forth the underlying facts and data supporting his opinion. (Petition for Rehearing and Suggestion that Rehearing be En Banc.)

## REASONS FOR GRANTING REVIEW

### I.

### THE NEW FEDERAL RULES OF EVIDENCE, RULES 702-705, PROVIDE THAT OPINION EVIDENCE ON THE ULTIMATE ISSUE IS ADMISSIBLE. ON MOTION FOR SUMMARY JUDGMENT, THE NINTH CIRCUIT CONTINUES TO APPLY THE FORMER RULE PROHIBITING OPINION TESTIMONY ON THE ULTIMATE ISSUE.

Prior to adoption of the Federal Rules of Evidence, experts were precluded from testifying on the ultimate issue in a case and were first required to state the facts and data they relied on in forming their opinion. Enactment of the Federal Rules of Evidence changed this.[2] Rule 704 abolished the "ultimate issue" rule and Rule 705 authorizes the admission of an expert's opinion without prior disclosure of the underlying facts or data. (*Case & Co., Inc. v. Board of Trade of City of Chicago* (7th Cir. 1975) 523 F.2d 355, 361 ["The ultimate issue rule, however, is abolished by Rule 704 of the Federal Rules of Evidence"]; 11 *Moore's Federal Practice*, §705.10 ["Rule 705 authorizes the admission of the opinion testimony of an expert without the prior disclosure of the facts or data which underlie his opinion, unless the trial court requires otherwise. The rule relies upon effective cross-examination to reveal the factual basis for an expert's opinion which, in turn, permits the fact finder to determine what weight to accord the testimony"]; see also Rule 705 — Notes of Advisory Committee on Proposed Rules of Evidence.) It necessarily follows that "[o]pinion testimony that would be admissible at trial may be submitted in an affidavit" in connection with a motion for summary judgment. (*Case & Co., Inc. v. Board of Trade of City of Chicago, supra*, 523 F.2d at 361; *Paton v. La*

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[2]This Court has not yet interpreted Rules 702-705 in this context.

*Prade* (3rd Cir. 1975) 524 F.2d 862, 871 ["[W]here, as here, the affidavits are submitted to oppose the grant of summary judgment, opinion evidence is appropriately considered to support the existence of a disputed issue of fact"].)[3]

Congress clearly intended that an expert, once qualified, could offer an opinion on the ultimate issue without first setting forth supporting facts or data. (See 3 *Weinstein's Evidence* ¶705, pp. 705-1 to 705-2 for an example of the abbreviated type of expert opinion anticipated under the rule.)

Moreover, an expert's opinion as to the ultimate issue to be proven, standing alone, may be sufficient to support a verdict. (See *Lumbermen's Mut. Cas. Co. v. Ind. Acc. Comm.* (1946) 29 Cal.2d 492, 500 ["The failure . . . to state the reason for the expert opinion does not strip it of probative value to the point where it is not substantial evidence supporting the decision. . . . It goes to the weight of such evidence. . . . [Defendants] had the right to cross-examine the witnesses if they saw fit"]; see also *People v. Allen* (1963) 212 Cal.App.2d 857, 861.)[4]

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[3]In this products liability case, Plaintiffs' expert, Mr. Braverman, addressed by affidavit the ultimate issue to be proven, *i.e.*, whether there was a defect. (See *Hughes v. American Jawa, Ltd.* (8th Cir. 1976) 529 F.2d 21, 25 ["Since it is clear that the existence or non-existence of a defect is a 'material' fact in this strict tort liability litigation, we must decide whether there is a 'genuine' issue concerning this particular fact"].)

[4]Our research has not found any federal cases which have addressed this point. However, in the California cases cited above, the courts were considering expert opinions rendered under California Evidence Code section 802, one of the state codifications which served as model for Rule 705. (See Federal Rules of Evidence, Rule 705 — Notes of Advisory Committee on Proposed Rules of Evidence; see also 11 *Moore's Federal Practice*, §705.01.)

Nevertheless, the Ninth Circuit, as demonstrated by its decision in this case, requires something more to permit a case to survive a motion for summary judgment: It relies on the abolished "ultimate issue" rule and requires plaintiffs' experts to preliminarily set forth facts and data to back up their opinion.[5] This is directly contrary to the law because it requires more evidence to overcome a summary judgment motion than is required to support a verdict. As a consequence, litigants are being deprived of their right to a jury trial and to due process of law. Accordingly, this Court should grant certiorari to assure uniform and correct application of the rules.

## II.

## UNLESS THE SAME RULES OF EVIDENCE APPLY TO EXPERT OPINION SUBMITTED IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT AS APPLY TO THE PRESENTATION OF SUCH OPINIONS AT TRIAL, PLAINTIFFS WILL CONTINUE, AS IN THIS CASE, TO BE DEPRIVED OF THEIR RIGHT TO JURY TRIAL AND TO DUE PROCESS OF LAW EVEN THOUGH THEY HAVE PRESENTED EVIDENCE WHICH WOULD BE ADMISSIBLE AT TRIAL AND SUFFICIENT TO SUSTAIN A VERDICT IN THEIR FAVOR.

By applying the abolished rule, the Ninth Circuit forces plaintiffs out of court on summary judgment even though they have made an evidentiary showing which would be

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[5]In this case, the Ninth Circuit did not question the qualifications of plaintiffs' expert or the admissibility of his opinion that the "substandard and/or defective condition of the propellant charge was a cause of the premature inbore explosion", but found his affidavit "does not create a triable issue of fact as to the existence of a defect" because it is "so devoid of particulars", "is no more than an assertion concerning the ultimate issue to be proved" and " 'in the context of a motion for summary judgment, an expert must back up his opinion with specific facts.' " (Appendix "A", pp. 1-2.)

sufficient to go to the jury at trial.[6] In effect, the refusal to apply the Federal Rules of Evidence to motions for summary judgment results in the anomalous situation where it is easier for defendants to dispose of a controverted issue of fact on summary judgment motion than it would be for them to do so at trial.

We do not suggest that the Federal Rules of Evidence prevent a court from granting summary judgment against a party who relies solely on an expert's opinion that consists merely of "theoretical speculations", of "pettifoggery", of "quibble", or "is incontrovertibly demonstrated to be false", as was the case in *United States v. Various Slot Machines on Guam, supra,* 658 F.2d 697, 699-701. But that is not the effect of the Ninth Circuit's application of the abolished "ultimate issue" rule in summary judgment proceedings. The effect is much broader: It rejects qualified expert opinion on the ultimate issue, even though such opinion evidence is admissible and sufficient to sustain a verdict at trial. The application of a discredited and abolished rule of evidence deprives litigants of their right to a jury trial. Review by writ should be granted.

## III.

## THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN ADICKES v. S.H. KRESS & CO. (1970) 398 U.S. 144 AS TO THE PROPER STANDARD FOR GRANTING A MOTION FOR SUMMARY JUDGMENT. THE NINTH CIRCUIT IMPROPERLY SHIFTS THE BURDEN TO PLAINTIFFS TO SHOW A TRIABLE ISSUE OF FACT WITHOUT FIRST REQUIRING THE DEFENDANTS TO SHOW THE ABSENCE OF SUCH ISSUE.

In this products liability action, Davies Nitrate Co. and Olin moved for summary judgment. (See their affidavits in support of the motions for summary judgment [Appendices

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[6]See footnote 5 above.

E, F, and G].) Defendants were the moving parties on the motions for summary judgment and as such, it was their burden to show that no genuine issue existed as to any material fact and that they were entitled to a judgment as a matter of law. (Fed. Rules Civ. Proc., Rule 56(c), 28 U.S.C.; *Adickes v. S.H. Kress & Co.* (1970) 398 U.S. 144, 160, 26 L.Ed.2d 142, 155, 90 S.Ct. 1598 [" '[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented.*' " (Emphasis by the Court)].) Their showings totally failed to establish the absence of all material issues of fact.

Nevertheless, in direct conflict with this Court's decision in *Adickes v. S.H. Kress & Co., supra,* 398 U.S. at 160, both the district court and the Ninth Circuit ignored Defendants' failure to sustain their burden of proof on the motion for summary judgment, never addressed this issue, and improperly looked only to Petitioners' showing in opposition to the motions for summary judgment to determine whether a triable issue of fact existed. (See Appendix A, the Ninth Circuit's memorandum opinion, and Appendix B, the district court's memorandum to counsel.) This effectively shifts the burden of proof from defendants (where it belongs as a matter of law) to plaintiffs.[7]

Finally, the correctness of the decision below, even assuming the propriety of the tests employed, is open to se-

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[7]For example, in this case the district court stated that plaintiffs were unable to assert a factual basis for finding that the product of any of the defendants was in any manner defective or contributed to the untimely explosion and that "[t]his is not surprising, because the nature of the accident, the large numbers of component parts that made up the projectile, and the many intervening circumstances between manufacture and explosion, probably renders such a showing impossible." (Appendix B.)

rious question. The affidavits show quite plainly that a genuine triable issue of fact exists as to whether Defendants' products were defective and/or substandard and whether such defect and/or substandard condition contributed to Plaintiffs' injuries. The refusal of the district court and the Ninth Circuit to permit these Plaintiffs their right to a trial by jury in this case cannot be justified.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,
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## APPENDIX A.

### Memorandum.

In the United States Court of Appeals for the Ninth Circuit.

Kenneth Thomas Dill, et al., Plaintiffs-Appellants, v. Davies Nitrate Co., et al., Defendants/Appellees. No. 80-6073 D.C. No. CV-76-2877-WPG

Filed: March 26, 1982.

Appeal from the United States District Court for the Central District of California, William P. Gray, District Judge, Presiding. Argued and submitted February 3, 1982

Before: SKOPIL and SCHROEDER, Circuit Judges, and EAST,* District Judge.

Appellants seek to overturn the summary judgment entered in favor of appellees in this products liability case arising out of a tragic "inbore" cannon explosion. Appellee Olin Corporation is the manufacturer of the propellant charge; appellee Davies Nitrate is the manufacturer of potassium nitrate, one of the chemicals used in the charge.

The appellants argue that a genuine issue of material fact was created by their expert's affidavit which stated that the "substandard and/or defective condition of the propellant charge was a cause of the premature inbore explosion . . . ." The affidavit does not mention any defect in the chemical manufactured by appellee Davies Nitrate, nor does it identify the defect or describe the nature of the substandard condition of the propellant. An affidavit so devoid of particulars does not crate a triable issue of fact as to the existence of a defect; it is no more than an assertion concerning the ultimate issue to be proved. As this Court stated in

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

*United States v. Various Slot Machines*, 658 F.2d 697, 700 (9th Cir. 1981), "in the context of a motion for summary judgment, an expert must back up his opinion with specific facts." *See 6 Moore's Federal Practice* ¶ 56.22[1], at 1316 (1980) ("The affidavit [in a Rule 56 motion] is no place for ultimate facts and conclusions of law . . . .").

This Court's decision in *Biegler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980), is readily distinguishable since in that case, a negligence action, the expert's affidavit clearly identified the precise substandard condition (insufficient lighting) which caused the accident. We made that distinction in *United States v. Various Slot Machines, supra*, at 701. The expert's affidavit in this case did not identify the defect or substandard condition.

Affirmed.

EAST, Senior District Judge, dissenting:

I respectfully dissent since I am fast to the conclusion that the evidentiary value, force and effect of the appellants' expert's opinion, expressed in affidavit form, is equal to that of the expert's opinion similarly utilized in *Bieghler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980). In *Bieghler*, "the precise substandard condition" was "insufficient lighting." In the appellants' expert's opinion here, the precise substandard condition was the "substandard and/or defective condition of the propellant charge [which] was a cause of the premature inbore explosion."

*Bieghler* held the expert's opinion there expressed to be sufficient to defeat an adverse summary judgment. With all humble deference to the author of *Bieghler*, I cannot accept the majority's distinction between this situation and the *Bieghler* situation.

I would vacate the summary judgment and remand for further proceedings.

## APPENDIX B.

### Memorandum to Counsel.

United States District Court Central District of California.

Kenneth Thomas Dill, et al., Plaintiffs, v. Etowah Manufacturing Company, etc., et al., Defendants. Case No. CV 76-2877-WPG.

Filed: October 18, 1978.

Subsequent to the hearing on the motion of certain defendants for summary judgment, I have restudied the memoranda and affidavits submitted by the respective parties. In light of such consideration and the oral arguments advanced at the hearing, I am signing and causing to be filed the findings and conclusions and summary judgments proposed on behalf of Olin Corporation, ICI Americas Inc., Davies Nitrate Company, National Presto Industries, Inc., and Rulon Company. In brief supplementation of the submitted findings, my reasons for such actions are summarized here:

1. The plaintiffs have been able to assert no factual basis for a finding that the product of any of the above-listed defendants was in any manner defective or that it contributed to the untimely explosion. This is not surprising, because the nature of the accident, the large numbers of component parts that made up the projectile, and the many intervening circumstances between manufacture and explosion, probably render such a showing impossible.

2. *Res ipsa loquitur* cannot assist the plaintiffs, because the instrumentality that caused the explosion, whether it be considered the assembled projectile as a whole or one of its component parts, was not under the control of any of these defendants at any time leading up to the accident.

3. The doctrine of strict liability does not help the plaintiffs, because there has been no credible showing that the

product supplied by any particular defendant was defective at the time of manufacture or delivery:

(a) *Olin Corporation* manufactured the propellant powder by the ton and assembled the propellant charge into bags by the thousands, under close government inspection. There is no indication that any of this material was defective, other than the unsupported expression of opinion by one Shelley Braverman ". . . that the substandard and/or defective condition of the propellant charge was a cause of the premature in-bore explosion of September 20, 1975." This is far from a sufficient establishment of a defect that would impose upon Olin Corporation the burden of proving that something other than its product caused the untimely explosion.

(b) *ICI Americas Inc.* presumably manufactured the TNT that was in the projectile. But such TNT was shipped in bulk and was filtered and melted and incorporated into the projectile by others. Here again, there is no suggestion that the TNT furnished by ICI was in any way defective. Mr. Harris, a deposition witness for the plaintiff, speculates that a premature explosion might be caused by cavitation or exodation problems, but he also pointed out that such a condition would be traceable to the manner in which the TNT was loaded into the projectile and not to its original manufacture.

(c) *Davies Nitrate Company* supplied potassium nitrate that made up a minute portion of the igniter powder manufactured by Olin Corporation. Here again, there is no showing whatever that anything was wrong with this ingredient.

(d) *National Presto Industries, Inc.* manufactured an item known as a bottom-closing screw assembly, which apparently is an integral part of the fuse that should be

attached to the artillery shell before firing. It appears from the affidavits submitted by this defendant that there is no possible way of ascertaining whether a National Presto product was contained in any of the fuses that were delivered to the crew operating the artillery piece that was involved in the accident. Certainly, one of the conditions precedent to strict liability is a showing that a particular defendant's product was involved.

(e) *Rulon Company* also manufactured certain metal parts that were assembled into fuses at an army ordinance plant. As was the situation concerning National Presto, the inability to tract a Rulon Company product into the fuse that was in the gun at the time of the explosion precludes application of strict liability.

The plaintiffs understandably acknowledge that they must necessarily rely upon *res ipsa loquitur* or the doctrine of strict liability in order to establish a *prima facie* case against any of the defendants. As is indicated above, such help is not available to them. In the absence of any genuine issue of fact that could properly justify submitting the case to a jury, the interests of justice require that summary judgment be granted in favor of the above-mentioned defendants.

Dated: October 18, 1978.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

## APPENDIX C.

### Order.

In the United States Court of Appeals for the Ninth Circuit.

Kenneth Thomas Dill, et al., Plaintiffs-Appellants, vs. Davies Nitrate Co., et al., Defendants-Appellees. No. 80-6073.

Filed: June 8, 1982.

Before: SKOPIL and SCHROEDER, Circuit Judges, and EAST,* District Judge.

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

## APPENDIX D.

### Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually

and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affimatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or

solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

## APPENDIX E.

### Affidavit of H. Andrew Wasmund.

State of California, County of Los Angeles — ss.

I, H. ANDREW WASMUND, being duly sworn, say:

I am an attorney at law, admitted to practice before all of the Courts of the State of California, and before the bar of the United States Court for the Central District of California. I am an associate in the law firm of Schell & Delamer, attorneys of record for the Defendant DAVIES NITRATE COMPANY, in the United States District Court Case *Kenneth Thomas Dill, et al., v. Etowah Manufacturing Company, et al.*, Case No. CV 76-28-WPG.

The facts set forth herein are personally known to me, and I have first hand knowledge of the same, or said facts are based on information and belief, which I believe to be true. If called as a witness, I would and could competently testify to the existence of the facts set forth hereinbelow.

The above-referenced case arises out of an explosion accident occurring on September 20, 1975, at Fort Irwin, California. The plaintiffs herein were Reservists in the California National Guard, on weekend reserve duty. While they were operating a M105 artillery vehicle, a 155mm howitzer shell exploded in the bore of the cannon, allegedly injuring Plaintiffs.

Plaintiff herein have named as a defendant in this action every manufacturer of every component part of the allegely defective howitzer shell, and propellant used in conjunction thereto.

The moving defendant DAVIES allegedly provided potassium nitrate as a component part for the igniter powder used in conjunction with the subject shell (please see the list of manufacturers attached to plaintiffs' memorandum

of law regarding res ipsa loquitur and product liability, served and filed Feburary 16, 1978).

Plaintiff's counsel has indicated to this Court at the hearing of March 3, 1978, that plaintiffs cannot and will not produce evidence bearing upon the negligence of the moving Defendant or upon the alleged condition of the potassium nitrate allegedly manufactured by DAVIES (please see the aforesaid Memoranda of Law).

Plaintiffs are attempting to rely on the doctrine of res ipsa loquitur and products liability in order to shift their burden of proving negligence and products liability of the moving defendant. At the aforesaid hearing of April 3, 1978, the honorable William P. Gray invited the filing of the instant Motion for Summary Judgment after hearing and ruling on the Hearing res ipsa loquitur and products liability.

The inability of the Plaintiffs to produce any evidence concerning the negligence or product defect of the product manufactured by the moving Defendant removes all issues of material fact that remain to be tried against the moving Defendant.

The moving Defendant merely provided a component part of the igniter powder to the co-defendant Olin Corp. Please refer to further affidavits, which will filed and served in support of this motion at a later date, which detail the participation of the moving Defendant in providing potassium nitrate, as a component part of the igniter powder.

As argued in the Memorandum of Points and Authorities, filed herewith, the moving Defendant is entitled to summary judgement as a matter of law.

DATED: May 11, 1978.

Schell & Delamer
/s/ H. Andrew Wasmund
H. Andrew Wasmund

On the 11th day of May, 1978, before me personally appeared H. Andrew Wasmund, known to me to be the person whose name is subscribed to the within instrument, who subscribed and swore to the truth of the above instrument.

IN WITNESS WHEREOF, I have hereinto set my hand and affixed my official seal the day in herein this instrument first written above.

/s/ June Ito
June Ito
Notary Public
The State of California,
County of Los Angeles

[Seal]

## APPENDIX F.

**Affidavit of Thomas W. Wheaton in Support of Defendant Davies Nitrate Company's Motion for Summary Judgment.**

United States District Court Central District of California.

Kenneth Thomas Dill, et al., Plaintiffs, v. Etowah Manufacturing Company, etc., et al., Defendants. No. CV 76 2877 WPG.

Date: July 10, 1978, Time: 2:00 p.m., Place: Courtroom No. 6.

State of New Jersey, County of . . . — ss.

Filed: June 23, 1978.

AFFIDAVIT OF THOMAS W. WHEATON

COMES NOW Defendant DAVIES NITRATE COMPANY, who, in support of its Motion for Summary Judgment, submits the following Affidavit:

I, THOMAS W. WHEATON, being duly sworn, say: In 1969, I was the Plant Manager of DAVIES NITRATE COMPANY, a Defendant in the above-entitled case.

I have made a thorough inspection of the records of the said Defendant, in an attempt to locate documents concerning DAVIES' alleged supplying of potassium nitrate to OLIN MATHIESON CHEMICAL CORPORATION, a Co-Defendant in the above referenced case. As a result of my search, I have found certain documents which reflect that DAVIES did supply potassium nitrate to OLIN in 1969:

I. OLIN MATHIESON CHEMICAL CORPORATION'S Purchase Order OI-29719, dated February 7, 1969, which is attached hereto as Exhibit "A".

II. DAVIES NITRATE COMPANY'S shipping orders numbers 3315, 3382, 3476, 3552, 3686, and 3381, together with their respective Certificate of Compliance and Anal-

ysis, copies of which are collectively attached hereto as Exhibit "B".

A study of the Ammunition Data Card Ordnance Corps, previously supplied by Plaintiff's counsel in this case, a copy of which is attached hereto as Exhibit "C", reveals that potassium nitrate was only 0.46% of the chemical components involved in the product assembled by the Co-Defendant OLIN. Postassium nitrate is generally used as an oxidizing agent for black powder.

It is unknown to affiant whether the potassium nitrate supplied by DAVIES to OLIN, as reflected in the attached Purchase Order and Shipping Orders, was used in any product or part of any product allegedly involved in the occurrence of September 20, 1975, as alleged in the complaint in the above-referenced case.

DATED: June 23, 1978

/s/ Thomas W. Wheaton
Thomas W. Wheaton

On the 23rd day of June, 1978, before me personally appeared THOMAS W. WHEATON, known to me to be the person whose name is subscribed to the within instrument, who subscribed and swore to the truth of the above instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day in this instrument first written above.

/s/ Josephine Knoedler
Josephine Knoedler
Notary Public in and aforesaid
County and State

[Stamp]

## APPENDIX G.

### Affidavit of Byron C. Baldridge.

State of Florida, County of Wakulla — ss.

Byron C. Baldridge, being first duly sworn, deposes and says:

1. I am presently Director of Development and Quality Control — Propellant Operations — St. Marks, Florida — for Olin Corporation ("Olin"), one of the defendants in this lawsuit. I was formerly the Resident Manager of the Indiana Army Ammunitions Plant, a government-owned facility operated by Olin, which in 1969 (allegedly) manufactured and bagged the propellant charge used by plaintiffs at the time of their artillery gun accident on September 20, 1975.

2. I have over 35 years of experience dealing with the manufacture and shipment of propellant and propellant charges.

3. I have reviewed the limited facts available surrounding the premature in-bore explosion of a 155mm artillery shell at Fort Irwin, California on September 20, 1975.

4. Based upon my knowledge of the accident, and my years of experience dealing with propellant powder and propellant charges, it is totally impossible for a propellant charge manufactured and bagged by Olin in 1969 to have caused the accident in question. The reasons are as follows:

(a) Propellant powder is manufactured by the ton and propellant charges are manufactured, bagged and shipped by the hundreds. If one propellant charge is sub-standard, it is impossible for hundreds of propellant charges to be any different. Olin received no reports of any substandard propellant charges or in-bore explosions of artillery guns using Olin propellant

charges manufactured and bagged during 1969 or any other time.

(b) The inspection and quality control system employed by the United States Army at the Indiana Army Ammunitions Plant virtually precludes the manufacture, assembly, and shipment of any propellant charge not up to Army specifications.

(c) If something was theoretically wrong with a propellant charge it could not cause an in-bore explosion: The projectile will either not be fired from the gun or will be fired from the gun at too slow or great a speed, but there is nothing which could possibly cause a properly fused and loaded artillery projectile to explode in-bore.

The foregoing is true and correct of my own personal knowledge and if called as a witness I could testify competently to the accuracy thereof.

/s/ Byron C. Baldridge
Byron C. Baldridge

SUBSCRIBED and SWORN to before me this 19th day of May, 1978.

/s/ B. Dianne Parker
Notary Public in and for said
County and State

[Seal]

## APPENDIX H.

### Affidavit of Shelley Braverman.

State of New York, County of Greene — ss.

Shelley Braverman, being first duly sworn, states as follows:

1. I am a munitions and fire arms expert and have previously qualified to testify as an expert, and have testified in Federal Court, on the subject of the causes of and product defects leading to premature inbore explosion in military canon of the same or similar type as is represented in the within action of Kenneth Thomas Dill, et al. vs. Etowah Manufacturing Company, et al., defendants; said accident having taken place on September 20, 1975 at Ft. Irwin, California.

2. I have over thirty-two (32) years of experience dealing with aspects of design and manufacture of fire arms, explosives and munitions.

3. At the request of attorneys for plaintiffs I have investigated the subject accident of September 20, 1975, involving a premature inbore explosion of a 155 mm. artillery shell at Ft. Irwin, California, September 20, 1975. I have personally visited the Picatinny Arsenal in Dover, New Jersey and have personally examined remaining fragments of the subject artillery shell. I have reviewed photographs of the accident scene and of the remaining shell fragments. I have reviewed army documents and reports supplied to me by attorneys for the plaintiffs.

4. Based upon my knowledge and investigation of the accident and based upon my years of training and experience in the armaments and munitions field, it is my opinion that the subject round was fused prior to the premature inbore explosion of September 20, 1975: it is further my opinion that the substandard and/or defective condition of the pro-

pellant charge was a cause of the premature inbore explosion of September 20, 1975.

/s/ Shelley Braverman
Shelley Braverman

Subscriber and sworn to before me this 20th day of June, 1978.

/s/ Maude J. Borne
Maude J. Borne
Notery Public

[Seal]

## APPENDIX I.

**Findings of Fact and Conclusions of Law in Favor of Davies Nitrate Company.**

United States District Court, Central District of California.

Kenneth Thomas Dill, et al., Plaintiffs, v. Etowah Manufacturing Company, etc., et al., Defendants. No. C 76 2877 WPG (Proposed).

Filed: October 18, 1978.

This cause was heard by this Court on July 10, 1978, upon motion of the Defendant DAVIES NITRATE COMPANY for summary judgment. The Court has carefully considered the motion, the affidavits, the exhibits, the pleadings, and the memoranda of points and authorities in support of and in opposition thereto.

The Court finds as follows:

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### Findings of Fact

1. The Plaintiffs have not and cannot introduce evidence bearing upon the alleged negligence of the Defendant DAVIES NITRATE COMPANY.

2. The Plaintiffs have not and cannot introduce evidence bearing upon the alleged defect of the potassium nitrate manufactured by the Defendant DAVIES NITRATE COMPANY.

3. No triable issues of material fact remain with which the Plaintiffs can establish any liability against the Defendant DAVIES NITRATE COMPANY.

#### Conclusions of Law

1. The Plaintiffs, being unable to introduce evidence of negligence or product defect of the potassium nitrate

manufactured by the Defendant DAVIES NITRATE COMPANY, and because the Plaintiffs cannot rely on the doctrines of Res Ipsa Loquitur or Products Liability to shift their burden of proof, the Plaintiffs have not and will not be able to establish a cause of action against the Defendant DAVIES NITRATE COMPANY at the time of trial.

DATED: Oct. 16, 1978

/s/ William P. Gray
William P. Gray
United States District Judge

## APPENDIX J.

**Findings of Fact and Conclusions of Law [Proposed].**

United States District Court, Central District of California.

Kenneth Thomas Dill, et al., Plaintiffs, v. Etowah Manufacturing Company, etc., et al., Defendants. No. CV 76-2877 WPG.

Filed: October 18, 1978.

Pursuant to Local Rule 3(g), defendant Olin Corporation submits its proposed findings of fact and conclusions of law in support of its Motion For Summary Judgment in its favor:

### I.
### FINDINGS OF FACT

1. Plaintiffs Kenneth Thomas Dill, Mark Richard Bartholomew, and Vincent Scott Perry, are each residents of the State of California.

2. Defendant Olin Corporation ("Olin") is a Virginia corporation with its principal place of business in Connecticut.

3. On February 6, 1978, plaintiffs were instructed by the Court to file a Memorandum stating their contentions as to each defendant in the lawsuit and as to how that defendant contributed to the cause of plaintiffs' accident. In response to that instruction as to defendant Olin, plaintiffs stated only that defendant Olin was in some manner responsible for the production of the propellant powder and the propellant charge, with no explanation as to how the propellant or propellant charge could possibly have contributed to plaintiffs' injury. Plaintiffs relied solely on theories of products liability and *res ipsa loquitur* that each defendant who had anything whatsoever to do with the manufacture of the artillery projectile, fuse, or propellant

must come forward and prove that it did not contribute to plaintiffs' injury.

4. Defendant Olin Corporation manufactured propellant powder and propellant charges which may have been utilized at the time of plaintiffs' accident. However, there is no factual support whatsoever for any claim that the propellant powder or propellant charge employed at Fort Irwin, California at the time of plaintiffs' accident contributed in any manner to the cause of that accident.

## II.
## CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction over this matter as between plaintiffs and defendant Olin Corporation.

2. Absent proof of some contribution to plaintiffs' accident, defendant Olin Corporation may not be sued for injuries suffered by plaintiffs.

3. Defendant Olin Corporation is entitled to judgment against plaintiffs on plaintiffs' Complaint.

Dated Oct. 16, 1978, at Los Angeles, California.

/s/ William P. Gray
William P. Gray, Judge,
United States District Court

## APPENDIX K.

### Proposed Summary Judgment.

United States District Court, Central District of California.

Kenneth Thomas Dill, et al., Plaintiffs, vs. Etowah Manufacturing Company, etc., et al., Defendants. No. CV ...

Entered: October 20, 1978

This cause was heard by this Court on July 10, 10:AM [W.P.G.] 1978, upon motion of the Defendant DAVIES NITRATE COMPANY for summary judgment. The Court has carefully considered the motion, the affidavits, the exhibits, the pleadings, and the memoranda of points and authorities in support of and in opposition thereto. William S. Hart, Esq., appeared as attorney for the Plaintiffs, and H. Andrew Wasmund, Esq., appeared as attorney for the moving Defendant.

IT IS ORDERED AND JUDGED that Defendant DAVIES NITRATE COMPANY's Motion for Summary Judgment be, and the same hereby is, granted.

IT IS FURTHER ORDERED AND JUDGED, that Plaintiff's action [W.P.G.] be dismissed as against the Defendant DAVIES NITRATE COMPANY.

DATED: October 16, [W.P.G.] 1978.

/s/ William P. Gray
William P. Gray
United States District Judge

## APPENDIX L.

**Summary Judgment in Favor of Defendant Olin Corporation [Proposed].**

United States District Court, Central District of California.

Kenneth Thomas Dill, et al., Plaintiffs, v. Etowah Manufacturing Company, etc., et al., Defendants. No. CV 76-2877 WPG.

Filed: October 18, 1978.

Defendant Olin Corporation's Motion For Summary Judgment in the above-captioned matter came on for hearing at 2:00 p.m. on July 6, 1978 before the Honorable William P. Gray, United States District Judge. Plaintiffs appeared through their attorneys, Harney & Moore by Williams S. Hart, and defendant Olin Corporation appeared through its attorneys, Lillick McHose and Charles, by Lawrence W. Dam. The Court having duly considered the Memorandum of Points and Authorities and the Affidavits filed by the parties and the arguments of counsel, and the Court having determined that there is no genuine issue of material facts remaining to be tried and that defendant is entitled to Judgment in its favor in accordance with its Proposed Findings of Facts and Conclusions of Law;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. Defendant Olin Corporation's Motion For Summary Judgment in accordance with Federal Rule of Civil Procedures 56 is hereby granted.

2. Defendant Olin Corporation is hereby awarded its costs incurred in this action in accordance with its cost bill to be subsequently filed with the Court.

Dated this 16 day of October, [W.P.G.] 1978 at Los Angeles, California.

/s/ William P. Gray
JUDGE, United States District Court.